SUPREME COURT, U.S.
FILED
JAN 12 1967
JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 880

ROBERT A. KENNEDY, as Treasurer of the State of Arizona, ROY L. THORNBRUGH, as Registrar of Contractors of the State of Arizona, and GARNER ELECTRIC COMPANY,

Petitioners

vs.

LOUISE POWELL, Trustee in Bankruptcy of the the Estate of Leon Showalter, bankrupt,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE STATE OF OHIO AS AMICUS CURIAE

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INDEX

	Page
Interest Of The Amicus Curiae	1
Reasons For Granting The Writ	2
I. The Case Presents A Question of Substantial Importance Affecting The Licensing Functions of Agencies of This State and Persons Dealing With Licensees	
Appendix A Section 917.14, Ohio Revised Code Re: Bond for Milk Dealers	6
Appendix B Section 943.03, Ohio Revised Code Re: Bond for Livestock Dealers or Brokers	7

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The State of Ohio files this brief as *amicus curiae* under sponsorship of William B. Saxbe, Attorney General of Ohio, pursuant to Rule 42 (4), Rules of the Supreme Court.

INTEREST OF THE AMICUS CURIAE

For the reasons set forth below, the State of Ohio as *amicus curiae* urges that the Court grant the petition for a writ of certi-

orari to the United States Court of Appeals for the Ninth Circuit to review its judgment in *Kennedy* v. *Powell,* 366 F.2d 346 (1966).

REASONS FOR GRANTING THE WRIT

I. *THE CASE PRESENTS A QUESTION OF SUBSTANTIAL IMPORTANCE AFFECTING THE LICENSING FUNCTIONS OF AGENCIES OF THIS STATE AND PERSONS DEALING WITH LICENSEES*

The question presented by petitioners to this court for review is:

> "Whether a trustee in Bankruptcy is entitled to a cash deposit posted by an Arizona licensed contractor as a condition precedent to securing his license or whether such funds should remain with the depository for the benefit of certain classes of claimants enumerated in the Arizona statute."

Ohio statutes dealing with licensing trades or occupations are quite similar to A.R.S. Section 32-1152, as amended, which is involved in the instant case.

Section 917.14, Ohio Revised Code (Appendix A), requires certain dealers or cooperative associations (milk dealers) to adopt one of three methods to establish financial responsibility the provisions of which read in pertinent part as follows:

> "* * * * * * * * *
>
> "(A) He shall file and maintain with the director of agriculture a surety bond to the state, which bond shall be of an amount determined by the director to be not less than twice the value of milk or cream purchased by such dealer during an average pay period of the preceding twelve months or, if figures are not available, in such amount as the director requires; such bond shall be conditioned upon the prompt payment by the dealer for all milk or cream purchased by him;
>
> "(B) He shall deposit, with a trustee satisfactory to the director, cash or negotiable securities of any kind authorized by section 2109.37 of the Revised Code for investment of trust

funds, equal in value to an amount as determined in division (A) of this section;

"(C) He shall file with the director a sworn financial statement showing all assets and liabilities with such pertinent and necessary supporting data as the director requires, and revise such statement as frequently as the director requires.

"* * * * * * * * *

"If bond is filed under division (A) of this section, it shall bind the principal and surety to pay any producer the amount due to him from the dealer when and as the amount thereof shall be admitted to be due by the dealer or shall have been established by judgment of a court. If securities are placed in trust, the conditions of the deposit contract shall be substantially of the same effect. The form of said bond and said deposit agreement shall be prescribed by the attorney general.

"* * * * * * * * *

Section 943.03, Ohio Revised Code, (Appendix B) sets forth similar provisions for livestock dealers or brokers. This section reads in pertinent part as follows:

"* * * * * * * * *

"No license shall be issued by the department until the applicant has furnished proof of financial responsibility. Such proof may be in the following forms:

"(A) A bond of a surety company authorized to do business in this state in the form prescribed by and to the satisfaction of the department, conditioned for the payment of a judgment against the applicant furnishing the bond and arising out of the failure of such applicant to conduct his business in accordance with sections 943.01 to 943.17, inclusive, of the Revised Code, or for nonpayment of obligations in connection with the purchase and sale of animals;

"(B) A deposit with the department of the required amount in money or negotiable bonds of the United States or of this state or of a political subdivision of this state of that par or face value, for the purpose of securing the payment of a judgment against the applicant furnishing the deposit and arising out of the failure of such applicant to conduct his business in accordance with sections 943.01 to 943.17, inclusive, of the

Revised Code, or for nonpayment of obligations in connection with the purchase and sale of animals, such deposit to be made under a deposit agreement prescribed by the department. Such deposit is not subject to attachment for any other claim or levy of execution upon a judgment based on any other claims.

"Any person damaged by any violation of such sections, or by any misrepresentation or fraud on the part of the broker or dealer licensed under this section may maintain an action against such broker or dealer and the sureties on the bonds provided for in the section, or either of them, or for the application of the deposit furnished the department. * * *

"* * * * * * * * *

"All moneys and securities deposited with the department shall be forthwith delivered to the treasurer of state and he shall not relinquish such moneys or securities except upon the written order of the department. The owner is entitled to receive all income from securities so deposited and the department shall issue a receipt for each deposit setting forth this fact.

"(C) In lieu of a bond or deposit, an annual report in the form prescribed by the department may be furnished as proof of financial responsibility provided the applicant has the bond authorized by the United States department of agriculture under 'Packers and Stockyards Act of 1921,' as amended, and such bond covers any business of the applicant as a dealer or broker.

"(D) In lieu of a bond or deposit, the applicant may file an annual sworn financial statement certified by a registered public accountant or a certified public accountant showing all assets and liabilities and such supporting data as the department may require. Such statement shall show the applicant's current net worth to be not less than triple the amount of the bond or deposit otherwise required by this section. If upon examination of any financial statement the department considers that the applicant has furnished insufficient proof of financial responsibility a written order may be issued directing such applicant to provide the bond or deposit required by this section. Failure to comply with such an order shall be cause for revocation or suspension of license."

It is readily apparent that the Ohio General Assembly intended

that all persons dealing with such licensees in their licensed businesses be secured. To this end various alternative methods of establishing and maintaining the financial responsibility of licensees were provided.

The decision of the Ninth Circuit Court of Appeals if applied to Ohio deposits defeats the purpose of the above statutes in that persons who deal with licensees who have chosen to deposit cash or securities in trust, as opposed to those who obtain surety bonds, are not secured in the event of a licensee's bankruptcy. This could deprive secured creditors of vested rights as noted by Judge Koelsch in his dissenting opinion.

The lower court's decision declares that the trustee in bankruptcy is entitled to the cash deposit but fails to explain the disposition as noted by petitioners. If the basis of the decision is pre-emption and the decision were to be applied to Ohio livestock dealers it would nullify a provision of Section 943.03, Ohio Revised Code, which states:

> " * * * Such deposit is not subject to attachment for any other claim or levy of execution upon a judgment based on any other claims.
>
> "* * * * * * * * *"

Ohio therefore submits that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit should be granted.

Respectfully submitted,
WILLIAM B. SAXBE
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APPENDIX A

Adoption of method guaranteeing payment to producer.

Sec. 917.14. Each dealer or any co-operative association making payments to producers for milk or cream except as provided in this section shall adopt one of the following methods *to establish financial responsibility:*

(A) He shall file and maintain with the director of agriculture a * * *surety* bond to the state, which bond shall be of an amount determined by the director to be not less than twice the value of milk or cream purchased by such dealer during an average pay period of the preceding twelve months or, if figures are not available, in such amount as the director requires; such bond shall be conditioned upon the prompt payment by the dealer for all milk or cream purchased by him;

(B) He shall deposit, with a trustee satisfactory to the director, cash or negotiable securities of any kind authorized by section 2109.37 of the Revised Code for investment of trust funds, equal in value to an amount as determined in division (A) of this section;

(C) He shall file with the director * * * a sworn financial statement showing all assets and liabilities with such pertinent and necessary supporting data as the director requires, and revise such statement as frequently as the director requires.

If upon examination of any financial statement and other pertinent factors, the director is of the opinion that the dealer filing the same does not provide sufficient security for payment of producers, he may issue an order requiring such dealer to * * * *file a financial statement prepared by a certified public accountant or a public accountant after an audit of the company's records or establish financial responsibility in accordance with division (A) or (B) of this section, or he may require the dealer to make more frequent payments for milk or cream delivered.* Failure to comply

with such an order shall be cause for revocation or suspension of license.

If bond is filed under division (A) of this section, it shall bind the principal and surety to pay any producer the amount due to him from the dealer when and as the amount thereof shall be admitted to be due by the dealer or shall have been established by judgment of a court. If securities are placed in trust, the conditions of the deposit contract shall be substantially of the same effect. The form of said bond and said deposit agreement shall be prescribed by the attorney general.

Any producer or association of producers having a claim against a dealer filing such bond, which claim is more than thirty days overdue according to the statement filed by such dealer, may bring action on such bond. Any co-operative association of producers acting as agent for producer members who have delivered milk or cream to such dealer may combine in one action claims of two or more of its members whose claims are overdue.

Any producer having a claim against a dealer making deposit with a trustee shall be entitled to payment by the trustee upon presenting to the trustee either a certificate of the director that the amount claimed is not larger than the amount reported by the dealer as being due to such producer as provided in section 917.13 of the Revised Code or a certified copy of judgment of a court establishing the amount due.

This section does not apply to purchasers of cream who pay for purchases on or before the time of the next delivery.

APPENDIX B

Licenses.

Sec. 943.03. Application for a license as a dealer or broker shall be made in writing to the department of agriculture. The application shall state the nature of the business, the municipal corporation, township, and county, the * * * *post-office* address at

which the business is to be conducted, and such additional information as the department prescribes.

The applicant shall satisfy the department of his character and good faith in seeking to engage in such business. The department shall issue to such applicant a license to conduct the business of a dealer or broker at the place named in the application. Licenses, unless revoked, shall expire on the thirty-first day of * * * *March* of each year.

No license shall be issued by the department to a dealer or broker having weighing facilities until the applicant has filed with the department a copy of a scale test certificate showing such weighing facilities to be in satisfactory condition, a copy of the license of each weigher employed by such applicant, and a certificate of inspection by the department showing livestock market facilities to be in satisfactory sanitary condition.

No license shall be issued by the department until the applicant has furnished proof of financial responsibility. Such proof may be in the following forms:

(A) A bond of a surety company authorized to do business in this state in the form prescribed by and to the satisfaction of the department, conditioned for the payment of a judgment against the applicant furnishing the bond and arising out of the failure of such applicant to conduct his business in accordance with sections 943.01 to 943.17, inclusive, of the Revised Code, or for nonpayment of obligations in connection with the purchase and sale of animals;

(B) A deposit with the department of the required amount in money or negotiable bonds of the United States or of this state or of a political subdivision of this state of that par or face value, for the purpose of securing the payment of a judgment against the applicant furnishing the deposit and arising out of the failure of such applicant to conduct his business in accordance with sections 943.01 to 943.17, inclusive, of the Revised Codes, or for nonpay-

ment of obligations in connection with the purchase and sale of animals, such deposit to be made under a deposit agreement prescribed by the department. Such deposit is not subject to attachment for any other claim or levy of execution upon a judgment based on any other claims.

Any person damaged by any violation of such sections, or by any misrepresentation or fraud on the part of the broker or dealer licensed under this section may maintain an action against such broker or dealer and the sureties on the bonds provided for in the section, or either of them, or for the application of the deposit furnished the department. The aggregate liability of the sureties for all such damage shall not exceed the amount of bond.

Unless the person damaged files claim with the dealer or broker and the sureties and the department within ninety days from the date of the alleged violation, or within ninety days after the discovery of fraud or misrepresentation on the part of the person complained against, he shall be barred from maintaining an action on said bond or for the application of said deposit. Such bonds and deposit agreements shall be in the form prescribed by the department.

The amount of such bond or deposit shall not be less than the nearest multiple of one thousand dollars above the average daily value of purchases, sales, or exchanges of livestock, whichever is the greatest, handled by such applicant on the ten largest business days during the preceding twelve months or such part thereof as such applicant was purchasing, selling, or exchanging livestock. In no case shall the amount of such bond or deposit be less than two thousand dollars.

Whenever the amount of bond or deposit calculated as above specified exceeds thirty thousand dollars, the amount of the bond shall be thirty thousand dollars plus ten per cent of the valuation in excess of thirty thousand dollars.

Whenever in the judgment of the department the business volume of the applicant or licensee is such as to render the bond or deposit inadequate, the amount of such bond or deposit shall be adjusted, upon notice, to meet sections 943.01 to 943.17, inclusive, of the Revised Code, and regulations relating thereto. All such bonds or deposit agreements shall contain a provision requiring that at least ten days' prior notice in writing be given to the department by the party terminating such bonds or deposit agreements in order to effect termination.

The termination of a bond shall not release the parties from any liability arising out of facts or transactions occurring prior to the termination date.

The termination of a deposit agreement shall neither release the party furnishing the deposit from any liability arising out of acts or transactions occurring prior to the termination date, nor shall the department permit the withdrawal of the deposit until after ninety days after the termination date, and then only if no claims under such agreement have been filed with the department. If any such claims have been filed with the department, the withdrawal of the deposit shall not be permitted until such claims have been satisfied or released and evidence of the satisfaction or release filed with the department.

All moneys and securities deposited with the department shall be forthwith delivered to the treasurer of state and he shall not relinquish such moneys or securities except upon the written order of the department. The owner is entitled to receive all income from securities so deposited and the department shall issue a receipt for each deposit setting forth this fact.

(C) In lieu of a bond or deposit, an annual report in the form prescribed by the department may be furnished as proof of financial responsibility provided the applicant has the bond authorized by the United States department of agriculture under

"Packers and Stockyards Act of 1921," *** as amended, and such bond covers any business of the applicant as a dealer or broker.

(D) In lieu of a bond or deposit, the applicant may file an annual sworn financial statement certified by a registered public accountant or a certified public accountant showing all assets and liabilities and such supporting data as the department may require. Such statement shall show the applicant's current net worth to be not less than triple the amount of the bond or deposit otherwise required by this section. If upon examination of any financial statement the department considers that the applicant has furnished insufficient proof of financial responsibility, a written order may be issued directing such applicant to provide the bond or deposit required by this section. Failure to comply with such an order shall be cause for revocation or suspension of license.